IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

FIRST APPEAL No 1860 of 1983

For Approval and Signature:

Hon'ble MR.JUSTICE R.K.ABICHANDANI and
MR.JUSTICE M.C.PATEL

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1. Whether Reporters of Local Papers may be allowed to see the judgements?

2. To be referred to the Reporter or not?

3. Whether Their Lordships wish to see the fair copy of the judgement?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?

5. Whether it is to be circulated to the Civil Judge?

NATIONAL INSURANCE CO

Versus

VIJAYAGAURI KALIDAS

Appearance:

MR SUNIL PARIKH, for the appellant.
MR JR NANAVATI for Respondent No. 1
NOTICE SERVED for Respondent No. 2
DELETED for Respondent No. 5

CORAM : MR.JUSTICE R.K.ABICHANDANI and
MR.JUSTICE M.C.PATEL

Date of decision: 14/12/98

ORAL JUDGEMENT (Per R.K.Abichandani,J.)

This appeal is directed against the award dated 24.2.1983 made by the Claims Tribunal (Main) Junagadh in M.A.C petition No. 165 of 1981, partly allowing the same and awarding compensation of Rs. 94,000/- with proportionate costs and interest at the rate of 6 per cent per annum, from the date on which the application seeking permission to issue as indigent person was filed, till the realisation of the amount. According to the claimants, on 2.12.1980, deceased Kalidas Durlabji, the owner of the rickshaw No. GTW 467 while being carried in the rickshaw after it was repaired and was being tested by the mechanic Kishor Dayalji, who was driving it, was killed when the rickshaw turned turtle due to the rash and negligent driving of the said driver.

The Insurance Company filed its written statement Ex.23, raising a plea that the Insurance Policy did not cover the use of the vehicle for organised racing, reliability trial or speed testing. The driver of the rickshaw in his objections Ex.17 denied that there was any negligence on his part and contended that the rickshaw dragged towards the left side of the road and the accident had occurred without there being any fault on his part.

2. There was no dispute about the fact that the insured owner was in the rickshaw at the time when after the repairs, it was taken out for trial and had died as a result of the rickshaw turning turtle.

3. The Tribunal held that the insured owner had died in the vehicular accident due to the rash and negligent driving of the said vehicle by the driver Kishore Dayalji. It was held that the claimants were entitled to compensation of Rs. 94,000/- and not Rs. 1,34,000/- as claimed.

4. On issue No.3 as to against whom the award should be made, construing the provisions of Section 95(5) of the Motor Vehicles Act and Clause 2 of item (3) of the Policy, the Tribunal held that not only the owner, but its authorised driver was also insured and therefore, when the accident occurred due to the negligence of the authorised driver and when liability of the death of the insured owner arose, the Insurance company was bound to indemnify the authorised driver. Since the authorised driver was liable to pay to the claimants for his negligence which resulted into death of the owner of the

rickshaw, it was not open for the Insurance company to contend that it cannot be held liable for the claim awarded against the driver. Relying upon the decision of this Court in LIC Vs. Legal Representatives of the Deceased Naranbhai reported in 1973 ACJ 226, in which it was held that where the driver was driving the vehicle with the assured's permission or under his order, the statutory indemnity was by reason of the special provision in the Act, one analogous to Section 95(5), was available for seeking indemnity from the insurance company and that our law has also specifically altered the general law because even right to avoid policy on this ground which the insurer has, does not come in the way of the duty of insurer to satisfy the judgement against the persons insured in respect of the third party risk under Section 96(1) of the Act, the Tribunal held that when the driver is covered by the policy of insurance, even the owner will become a third party vis-a-vis the driver. It was therefore, held that the insurance company was bound to indemnify the driver when he was held to be liable to pay compensation to the claimants.

5. The learned Counsel appearing for the appellant contended that the insurance company cannot be held liable in respect of the death of the insured owner because he was not a third party. He submitted that even if an authorised driver was driving the vehicle, the owner cannot be treated as a third party. He placed reliance on the decisions of the Karnataka High Court, in M. Akkavva Vs. New India Assurance Co.Ltd. and ors. reported in 1988 ACJ 445; Kerala High Court in National Insurance Co.Ltd. Vs. Annamma Babu and ors., reported in 1990 ACJ 909; Madras High Court in United India Insurance Co. Ltd. Vs. Lakshmi and ors. reported in 1990 ACJ 390; Bombay High Court in Oriental Insurance Co.Ltd. Vs. Chimajirao Kanhojirao Shirke and anr., reported 1992 ACJ 452; High Court of Andhra Pradesh in United India Insurance Co.Ltd. Vs. Odeti Mallu Bai and ors., reported in 1995 ACJ 851; Kusum Kunverba and others Vs. Umarbhai Kamaluddin Sipoy and ors. reported in 1982 ACJ (Supp.) 578, in support of his contentions.

It was also contended that the liability of the insurance company did not arise in view of the provisions of the second proviso to clause (b) of sub-section (1) of Section 95, as per which the policy was not required to cover liability in respect of the death of or bodily injury to persons being carried in the vehicle, except where the vehicle is a vehicle in which passengers are

carried for hire or reward or by reason of or in pursuance of a contract of employment. He pointed out from the policy Ex.31 that the vehicle in question was an auto-rickshaw, which was a delivery van and the limitations as to use showed that it could be used only under a public carrier's permit and that the policy did not cover use for organised racing, pace-making, reliability trial or speed test and further that it did not cover use for the conveyance of the passengers for hire or reward.

6. The learned Counsel appearing for the respondent claimants 1 to 4, contended that the insured owner who was being carried in the said vehicle, was a third party vis-a-vis the authorised driver and since the authorised driver was a person insured under the policy, the insurance company was liable to indemnify him by honouring the award. It was argued that, in any event, in view of the expression "any person" occurring in clause (b) (i) of Section 95(1) of the Act, the liability in respect of any person including the owner who is carried in the vehicle was covered when the vehicle was driven by an authorised driver. He placed reliance upon Section II, Clause (3) of the policy, in support of his contentions.

7. There is no dispute about the fact that the policy Ex.31 was in respect of a commercial vehicle described as A/R D.Van and that it covered third party risk. The policy did not cover use of the vehicle for the conveyance of the passengers for hire or reward or its use for organised race, pace-making, reliability trial or speed testing. The vehicle could be driven by the insured or any other person, provided he was in the insured's employ and was driving on his order or with his permission. The period of insurance was from 13.11.1980 upto 12.11.1981. Under Clause 3 of Section II pertaining to Liability to Third Parties, it was provided as under:-

"In terms of and subject to the limitations of the indemnity which is granted by this Section to the Insured, the company will indemnify any Driver who is driving the Motor Vehicle on the Insured's order or with his permission, provided that such Driver:

(a) is not entitled to indemnity under any other Policy.

(b) shall as though he were the Insured observe fulfil and be subject to the Terms Exceptions and Conditions of this Policy in so far as they can apply."

8. A Policy of insurance complying with the requirements of Chapter VIII of the said Act is essential for use of a Motor Vehicle in a public place by a person except as a passenger, as laid down in Section 94 thereof. The requirements of policies and limits of liability were laid down by Section 95 of the Act. Accordingly, as per Section 95(1)(b)(i), a policy of insurance must insure a person or classes of persons specified in the policy against any liability incurred by him, i.e. the person insured or the one falling in the class of persons specified in the policy who are insured, in respect of the death of or bodily injury to any person caused by or arising out of the use of such vehicle in a public place or in respect of the damage to any property of a third party caused by or arising out of such use. The death of or injury to "any person" can be caused by or can arise out of the use of such vehicle irrespective of the fact whether such person is in the vehicle or out of it. However, since the insurance is in respect of the liability that arise in context of such death or injury, when the person insured or a person of the class who are insured under the policy is himself dead or injured due to his own negligence, then, since no liability for one's own death or injury can be said to have arisen towards one's own life for his negligence, there is no occasion to indemnity such insured person for any liability arising as a result of his own negligence. That is why the insurer will not be liable under the policy for the death of or injury to such insured person caused by or arising out of the use of the vehicle by his own negligence. However, when the person insured is driving the vehicle and an accident is caused which raises his liability in respect of death of or bodily injury resulting therefrom to any person, the insurance company will be bound to indemnify him under the policy irrespective of the fact as to who that person was. In other words, it would be immaterial whether such other person was also a person insured under the policy. Thus, whether the insured driver by use of the vehicle causes death of or bodily injury to any other person whether such other person is also insured under the same policy or not and whether he was inside or outside the vehicle, the liability in respect of the death or injury that may be incurred by the insurer driver will have to be indemnified in view of the provisions of Section 95(1)(b), subject of course to the proviso with which we

shall later discuss and because of which the policy is not required to cover certain liabilities mentioned therein. Therefore, it makes no difference as to who is the inmate of the vehicle so long as the liability of the insured person arises for his death or injury. As provided in sub-clause (ii) of clause (b), the policy must insure against death of or bodily injury to any passenger of a public service vehicle caused by or arising out of the use of the vehicle in a public place. This is however subject to the proviso, which inter-alia provides that such policy shall not be required to cover liability in respect of the death of or bodily injury to persons being carried in the vehicle except where the vehicle is a vehicle in which passengers are carried for hire or reward or by reason or in pursuance of a contract of employment. A passenger would be a person, other than the driver of the vehicle, who is carried in the vehicle. Therefore, if death or bodily injury is caused by or arises out of the use of any vehicle to any passenger of the vehicle which is not a vehicle in which passengers are carried for hire or reward, there is no statutory obligation to cover such eventuality under the policy.

9. Section 95(1)(b)(i) speaks of liability, which may be incurred by the person or classes of persons who are insured under the policy. Such liability is two fold. Firstly, it is in respect of the death or bodily injury to any person and secondly, it is in respect of damage to any property of a third party. Such liability must be caused by or arise out of the use of the vehicle in a public place. It will be noticed that the expression "third party" occurs in context of the liability incurred in respect of damage to any property and so far liability in respect of death of or bodily injury is concerned, the provision refers to death of or injury to "any person". Therefore, liability in that case would arise due to the negligence of an authorised driver which has resulted in the death of the owner, which would be a liability arising in respect of the death of "any person". On true construction of this provision, it is not at all necessary to describe such person, even if he is the insured owner as a third party, because, he would squarely fall in the expression "any person" occurring in the phrase `any liability which may be incurred by him in respect of the death of or bodily injury to any person'.

10. We may recall here the majority decision in Digby Vs. General Accident Fire and Life Assurance Corpn.Ltd., reported in the All England Law Reports 1942 Vol.2 at

page 319, in which, where the claimant was a chauffeur employed by the owner of a car and the owner was injured in a collision, for which the claimant recovered damages against the chauffeur and the chauffeur thereupon claimed that he was entitled to be indemnified against the sum awarded as damages by the respondent Insurance Company under a policy issued by them to the owner though the policy had a marginal heading "Third Party Liability", the House of Lords held that an authorised driver was entitled to be indemnified against the damages awarded to the policy-holder in her claim against him. Lord Atkin while dealing with the expression " any person" occurring in a similar context, observed that "any person", should surely receive its ordinary meaning of any member of the public. The policyholder himself cannot come within the terms not because he is not a person: but because the clause only relates to a claim by any person which the policyholder is legally liable to pay: and such a liability cannot exist on a supposed claim at the same time by and against himself. The words "any person" do not bear a restricted meaning: but the policyholder is excluded from the scope of the indemnity by the very description of the liability insured. His Lordship then proceeded to consider the provision of indemnity extended to the person driving "on the order or with the permission of the policyholder" i.e. the authorised driver in the like manner, and held that the subject of indemnity was to be ascertained by reference, and, when it was extended to an authorised driver against all sums which he shall be liable to pay in respect of any claim by any person, the expression "any person" must receive it's ordinary meaning and on this occasion, the policyholder is plainly "any person": the authorised driver is excluded because as before he can be under no liability to himself. It was therefore, held that the appellant driver was entitled to be indemnified against the claim of the policyholder. Section 36 of the Road Traffic Act, 1930 laid down a requirement that the policy must be one which insures such person, persons or class of persons as may be specified in the policy in respect of any liability which may be incurred by him or them in respect of the death or bodily injury to any person caused by or arising out of the use of the vehicle on a road. In the context of that provision, it was observed that there was no reference therein to policyholder or injured, but merely to "such person, persons or classes of persons as may be specified in the policy" and a person issuing a policy of insurance was liable to indemnify the person or classes of persons specified in the policy in respect of any liability that the policy purports to cover in the case of those persons or classes

of persons. It was held that there was no doubt that the insurers intended to issue and the policyholder to receive a policy which in respect of third-party risks complied with the requirements of the Act; and that they intended, therefore, that in terms of Section 36 the persons specified should be insured in respect of any liability in respect of the death or bodily injury "to any person". Indicating the reason underlying this interpretation, Lord Atkin observed:-

> "I cannot help thinking that the judgements of those who think otherwise are unconsciously affected by the unusual and perhaps unexpected spectacle of master suing chauffeur and recovering heavy damages against him, no doubt with a view of eventual recovery from the insurance company. This kind of insurance, however, is not limited to the rich owners of 37 h.p Buicks. It is given to the poor owner of a small runabout who may lend his car for a week-end or for days to an equally impoverished friend. If during that period the borrower were to run down and injure the owner it would be in no way strange that the driver should be indemnified from his liability and the injured owner should receive the benefit of the indemnity. Such a situation as it appears to me is demanded by the Act."

Lord Wright in his concurring opinion observed that at first sight it might seem unusual that an employer should obtain judgement against her chauffeur; but an employee is generally as much liable to his employer if he causes his employer damage by negligence as is anyone else who does so. It was observed that any person driving another's car at the other's request would desire and expect to be covered by insurance. It was to meet this desire and expectation that the extended insurance was introduced and was made available to such drivers imposing on the insurer the extended liability in favour of other parties, if the policy purports to cover them. The legislature intended to secure that any person driving a car should be provided by the insurance with the means of compensating anyone who is injured by his negligence. It was held that in effect the policy holder became pro hac pace (for this occasion only), the third party under the policy. The resulting position was in no way different from what it would have been if the appellant had insured against third party risk by a separate policy.

Lord Porter in his concurring judgement dealing with the contention that the policyholder was a party to the contract and therefore, cannot be included in the term "third party" observed that it was doubtful if the phrase "third party liability" occurring in the margin of the relevant Section of the Policy (Section 2) when used in the policy at any stage has any such definite meaning as that ascribed to it by the respondents. He held that in a policy such as this, indemnity against third-party liability is used in contradistinction to indemnity against "loss or damage" to the car and means only that the insurer will indemnify the insured against any proper claim made upon him by a person who is injured by the negligent driving of the car. He observed "I do not think that there is any question of first, second and third parties. The phrase is merely a useful description of a particular type of insurance. Consequently the policyholder would be entitled to indemnity even if she were responsible for an accident, to say - a Lloyds underwriter who insured her, and the authorised driver would be protected against a claim in respect of such an accident and against a claim such as is made in this case by the policyholder herself." It was observed that the term "third party" must take its meaning from the words in collocation with which it is used.

11. The substance in the case of Digby Vs. General Accident Fire and Life Assurance Corpn.Ltd. is whether or not the policyholder can be called as a third party within the meaning of those words within the policy of motor insurance. Such a policy is necessarily extended to insure an authorised driver against claims of parties injured by his negligence and in this clause, the authorised driver becomes the insured and the insurance company are the insurers. That being so, the door is open for the policyholder to become a third party and claims by the policyholder against the driver must be indemnified by the company. The House of Lords have by a majority adopted this view of the construction of the policy.

12. In context of the provisions of Section 95(1)(b)(i), it is however, clear that the expression "third party" is used therein in respect of damage to any property of a third party caused by or arising out of the use of the vehicle in a public place. The death of or bodily injury to any person is not qualified by expression so as to mean a person other than who is insured and that meaning can be attributed only when the insured person by his own negligence causes the mishap in

which event no liability of the insured can be said to have arisen by his own conduct towards himself. However, as held by us hereinabove, the liability would arise in cases where the insured person by his negligence causes the death or bodily injury to any person other than himself, irrespective of the fact whether such person is insured under the policy or not. The rigour of this provision is contained only by the proviso to sub-section (1) which expressly restricted the coverage to cases where the vehicle is a vehicle in which passengers are carried for hire or reward and it will be only where the vehicle is of that type where the passengers are carried for hire or reward that the liability in respect of the death of or bodily injury to persons is required to be covered.

13. We gain support for this view from the decision of the Supreme Court in Smt. Mallawwa and ors. Vs. The Oriental Insurance Company and ors., reported in J.T 1988 (8) S.C 217, in which while construing the provisions of Section 95(1)(b) and the proviso, the Hon'ble Supreme Court observed that in absence of the proviso (ii) which restricted the generality of the main provision by confining the requirement to cases where "the vehicles is a vehicle in which passengers are carried for hire or reward or by reason of or in pursuance of a contract of employment", the main provision would have included all classes of vehicles including goods vehicles and all passengers whether carried for hire or reward or by reason of or in pursuance of a contract of employment or otherwise. It was observed that the words "any person" in the main provision would have included the employee of the person insured, and therefore an exception was made by enacting proviso (i) so as to restrict liability of the insurer in respect of his employees. It was held that both these exceptions contained in proviso (i) and proviso (ii) were made, as the legislature did not want to widen the liability of the insurer and the insured by making it more than what it was under the English Act, upon which Section 95 was based. It was held that though the proviso appeared after sub-clause (ii) of clause (b), it really remained a proviso to the earlier clause (b) which after the amendment became clause (b)(i). It was held that even earlier, the passengers of a public service vehicle were required to be covered compulsorily as they answered the description of passengers carried for hire or reward and the only effect of making a special provision for passengers of a public service vehicle was that proviso (ii) thereafter remained applicable to vehicles other than public service vehicles.

14. Thus, the liability of the insurance company in respect of the death or bodily injury to any person would not arise not because such person is one of the insured persons under the policy and therefore, not a third party, but because by virtue of the second proviso, the policy was not required to cover such risk except where the vehicle is a vehicle in which passengers are carried for hire or reward. The concept of third party in context of the provisions of Section 95(1)(b)(i) is clearly confined to damage to any property and therefore, it can be said that the policy would not cover damage to the property of the insured person or any of those falling in the class of insured persons under the policy. We therefore, do not subscribe to the view that the liability would not arise in respect of the insured person or persons falling in the class of insured persons on the ground that such insured is not a third party. We for the reasons stated above, do not subscribe to the view that where the owner insured has died in an accident caused by his own driver, there would be no liability on his part towards any third party and therefore, the insurance company's liability does not arise in such cases, taken by the Madras High Court in United India Insurance Co.ltd. Vs. Laxmi and ors., reported in 1990 ACJ 390.

15. As noted above, in the present case the vehicle admittedly was a goods vehicle. The policy clearly mentioned that it did not cover use for the conveyance of the passengers for hire or reward. Therefore, since it was admittedly not a vehicle in which passengers were to be carried for hire or reward or by reason or in pursuance of a contract of employment, the policy was not required to cover liability in respect of the death or or bodily injury to persons being carried in it, in view of proviso (ii) to Section 95 (i) of the Act. Therefore, not because the deceased was not a third party vis-a-vis the driver who was also injured, but because the policy was not required to cover liability in respect of the death of or bodily injury to persons that the claim must fail. The Tribunal while concentrating its discussion on the question as to whether the deceased owner of the vehicle was a third party vis-a-vis the authorised driver, who also was a person who would be covered by the policy, over-looked proviso (ii) of Section 95 (1) under which no such liability would arise for the death of a person caused by or arising out of the use of a goods vehicle. The issue has now been settled by the Supreme Court in Smt. Mallawwa's case (supra), wherein it is held that it would not be proper to consider a goods vehicle as a passenger vehicle on the basis of a single

use or use on some stray occasion of carrying a passenger in such vehicle for hire or reward. The vehicle, with a view to require coverage under proviso (ii), had to be a vehicle of that class in which passengers were carried for hire or reward. Referring to sub-section (2) of Section 95, which specifies the limits of liability and to clause (a) dealing with goods vehicle, the Supreme Court observed that there was a sure indication in the said provision of the fact that the legislature did not have in mind carrying of either the hirer of the vehicle or the employee in the goods vehicle.

16. The contention raised by the learned Counsel appearing for the respondent claimants that because the name of the driver Kishore Dayalji was deleted from the appeal, the appeal cannot proceed, is without any substance. The liability of the driver Kishore Dayalji had arisen on the ground of his negligent driving. The claimants had an independent cause of action against the driver on the basis of his negligence. The liability of the insurance company arises from the contract of insurance taken out by the policy holder. Kishore Dayalji did not challenge the award and he was not bound to challenge the same to enable the insurance company to take up its pleas on merits. Since the liability is joint and several, the insurance company can independently of the driver, challenge the award on the grounds that there was no statutory liability on its part and even when it succeeds on the ground that there was no cover under the policy in respect of the liability of the driver, the liability of the driver who has not challenged the award remains unaffected. There is therefore, no substance in the contention that the appeal should not be decided in absence of the driver, whose name was deleted during the pendency of the appeal.

17. In view of what we have said hereinabove, the impugned award in so far as it is made against the appellant Insurance Company cannot be sustained and is to that extent hereby set aside. The appeal is accordingly allowed with no order as to costs.

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